

**STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
STATE HISTORIC PRESERVATION REVIEW BOARD**

In the Matter of:

BRIAN T. MOORE,
Applicant/Appellant,

v

Docket No. 99-173-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Commission/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission, denying an application for retroactive approval to install a metal storm door in the entrance of the building located at 844 West Lovell Street, which is situated in Kalamazoo's Vine Area/South Street Historic District.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals under section 5(2) of the Local Historic Districts Act, as amended, being section 399.205 of the Michigan Compiled Laws.

At the direction of the Board, an administrative hearing was held on August 10, 1999, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on September 9, 1999, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board fully considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on Friday, October 1, 1999.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 0 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document, and,

Having done so,

IT IS ORDERED that the appeal be and the same hereby is denied.

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to both parties as soon as is practicable.

Dated October 1, 1999


Jennifer L. Radcliff, President
State Historic Preservation Review Board

Note: Section 5(2) of the Local Historic Districts Act provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act, such appeals must be filed with the circuit court within 60 days after the date of the mailing of notice of the Final Decision and Order of the Board. In addition, MCR 2.105(G) and 7.105 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

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STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

In the Matter of:

BRIAN T. MOORE,
Applicant/Appellant,

v

Docket No. 99-173-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission (the Commission), denying a request for retroactive approval to install a metal storm door in the front entrance of the building located at 844 West Lovell Street, Kalamazoo, Michigan. The building is situated in Kalamazoo's Vine Area/South Street Historic District (the District).

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that a person who is aggrieved by a decision of a historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of State.

¹ 1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of receiving relevant evidence and arguments. The Administrative Law Division conducted a hearing on August 10, 1999, in the Bigelow Room, Fifth Floor, Michigan Library and Historical Center, 717 W. Allegan Street, Lansing, Michigan. The hearing was held under procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

The Appellant, Brian T. Moore, chose not to appear at the administrative hearing. Instead, Mr. Moore presented his appeal entirely in written form, as is permitted by section 5(2) of the Act, supra. Larry L. Burns, Historic Preservation Coordinator for the City of Kalamazoo, attended the hearing as a representative of the Commission/Appellee. Amy Arnold, CLG Coordinator and Historic Preservation Planner for the Michigan Department of State, State Historic Preservation Office, attended as an observer for, and a representative of, the Review Board. Nicholas L. Bozen, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

In a letter dated July 23, 1999, Mr. Moore wrote that he was claiming financial hardship as the basis for his appeal. In particular, he asserted that he had installed a storm door that he

² 1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

could afford and that the door met city rental code requirements. He added that the door is a "hairsbreadth" from the more expensive door that the Commission would want him to install. He further stated that from a financial perspective, he cannot "dance" to the "Commission's tune", enclosing his three most recent federal income tax returns with his submission. He additionally indicated that he simply wants to keep his properties up to the codes that existed when he purchased them. He asked the Review Board to rule in his favor and then leave him alone, noting that he cannot function with some sort of historically accurate gestapo looking over his shoulder.

By way of a response, the Commission Chair, Lynn Smith Houghton, submitted a letter (Commission Exhibit No. 7) commenting on Mr. Moore's appeal. She wrote that on May 18, 1999, the Commission reviewed the issue of the storm door, which had been installed without issuance of a certificate of appropriateness, and voted unanimously to deny the application on the basis of Standard No. 6 of the Secretary of the Interior's Standards for Rehabilitation. She also wrote that in terms of Kalamazoo's local standards and guidelines, there are both narrative and illustrative descriptions of what is acceptable, and that the applicant's storm door was not in keeping with those guidelines. She added that the door that was installed did not fit properly within the opening and that the leftover space was filled in with plywood. She asked the

Review Board to consider her comments when deliberating its decision on this appeal.

Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant generally has the burden of proof in an administrative proceeding. 8 Callaghan's Michigan Pleading and Practice (2d ed), § 60.48, p 176, Lafayette Market and Sales Co v City of Detroit, 43 Mich App 129, 133; 203 NW2d 745 (1972), Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellant clearly occupies that position in this matter and consequently bears the burden of proof on any factual allegation in this case.

Section 5(2) of the Local Historic Districts Act, supra, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellant chose to present his case entirely in writing.

In that regard, the Appellant submitted one exhibit, with attachments, to establish his factual assertions. Appellant's Exhibit No. 1 consisted of Moore's letter claiming his appeal on the basis of financial hardship. Accompanying the letter were four attachments: a notice of denial dated May 24, 1999, and photocopies of Moore's U.S. individual income tax returns for 1998, 1997, and 1996. The 1998 return indicated that Moore owed an additional \$680 to the federal government for that particular tax year. It also

indicated that he had business income well in excess of \$10,000 (but under \$20,000), that he had substantial interest income in the \$3,000 range, but that he earned no salary or wages.

The Appellee/Commission also submitted documentary evidence in connection with this case. Commission Exhibit No. 1 was a copy of a letter dated April 16, 1999, from Larry L. Burns, Kalamazoo Historic Preservation Coordinator, to a "Mr. Moore", indicating that the city's Development Services Department had received a report that an unapproved new storm door had been installed at 844 West Lovell Street. The letter asked Moore to contact Burns to determine the course Moore would be taking to correct the violation. Commission Exhibit No. 2 consisted of copies of three photographs of front views, including the storm door, of the premises at 844 West Lovell Street. The photos were taken during April and May of 1999. Commission Exhibit No. 3 was an application for historic district project review signed by Brian T. Moore and dated April 20, 1999. This document also indicated that the property was actually owned by Harold K. Moore, the Appellant's brother. Commission Exhibit No. 4 was the notice of denial dated May 24, 1999. Commission Exhibit No. 5 was a photograph of the new storm door at 844 West Lovell Street taken in July, 1999. Commission Exhibit No. 6 was a copy of a tax bill reflecting property ownership by Harold K. Moore. Commission Exhibit No. 7 was Ms. Houghton's letter articulating the Commission's position on the appeal. Commission Exhibit No. 8 was a copy of a violation

memo, which was dated December 18, 1998 and concerned the "illegal storm door".

Commission Exhibit No. 9 was a copy of the local standards and guidelines that are applicable in Kalamazoo's historic districts. Commission Exhibit No. 10 consisted of a copy of Chapter 16 of the Kalamazoo Code, which governs Kalamazoo's historic districts.

Larry L. Burns, the Historic Preservation Coordinator for the City of Kalamazoo, testified at the hearing in support of the Commission's action. At the outset of his testimony, Burns indicated that Jeff Howe had been the city's historic coordinator before him, and that when he (Burns) was hired, he and Howe drove throughout the district taking inventory of possible violations. This apparently occurred during late February or early March, 1999. Burns stated he personally observed the "illegal" storm door at 844 West Lovell Street and noted that it appeared to be in violation of local historic preservation standards. However, Burns commented that in some cases, metal doors can be used to replace wooden doors, provided that they are configured like wooden doors.

Burns also testified that he wrote to Moore on April 16, 1999, and Moore contacted him. Burns stated that he then went to the premises, spoke with Moore for 45 minutes, and explained that he was there to help facilitate a positive outcome to the problem. Burns added that they discussed the process of securing approvals, including the need for applications and the requirement to follow historic standards and guidelines. Burns said that he was

surprised when Moore indicated that he was already familiar with them, and then Moore loaned Burns his personal copy of the standards and guidelines, complete with district maps. Burns also testified that he gave Moore a blank application. Burns added that he also wrote out several questions posed by Moore about where acceptable doors could be purchased, who were their manufacturers, and what were their catalog numbers. Burns indicated that Moore promptly completed and filed the application, but was unable to attend the Commission meeting on May 18, 1999.

Burns further testified that he spoke at the Commission meeting on behalf of Moore and told the Commission that Moore did not want to change the metal storm door that had already been installed. Burns indicated that the members of the Commission discussed the fact that this particular door did not meet federal Standard No. 6, because the new features did not match the old, nor did they meet Kalamazoo's standards and guidelines. Burns also said the Commission noted that space above the new door, which was four inches too short, had been filled with plywood. Burns added that the Commission had voted unanimously to deny the request.

Burns additionally testified that had Moore submitted an application before commencing work, the Commission would have worked with him to find an acceptable door within Moore's budget. However, Burns added that economics and the cost of the door never came up during his conversation with Moore. In terms of price, Burns stated that he never priced the door that Moore installed,

but that he (Burns) was familiar with lumber yard prices for materials, and that \$200 was probably a high figure for the installed door. Burns added that if an acceptable door cost even as much as \$50 more than the installed door, he would be surprised.

Burns also discussed Kalamazoo's historic standards and guidelines for replacement doors. He referenced page 24 of the local standards/guidelines book (Commission Exhibit No. 9) and stated that historic doors have a shallow kickplate and one window, whereas Moore's installed door had a large kickplate area and a mutton separating two glass panels. Burns also testified that the installed metal storm door was four inches shorter than the replaced wooden door and that the opening above the new door had been filled with plywood.

Findings of Fact

Based on the evidence submitted by the parties during the course of this appeal, the facts of this case are found to be as follows:

A. Kalamazoo's Vine Area/South Street Historic District

1. The property located at 844 West Lovell Street is located in Kalamazoo's Vine Area/South Street Historic District. The South Street portion of the district was originally established in 1976.³ The Vine Area portion of the district was designated in 1990.⁴

³ Kalamazoo Code, § 16-4.

⁴ Kalamazoo Code, § 16-8.

B. Local Historic Standards and Guidelines

2. The City of Kalamazoo adopted standards and guidelines for work in historic districts. (Commission Exhibit No. 9) On or about May 3, 1994, the Commission adopted revised standards and guidelines for storm doors. (Commission Exhibit No. 9, page 3) While the standards and guidelines provide that wooden storm doors are preferred, they do allow metal storm doors to be used, so long as they are not mill finished or anodized aluminum. They also prefer "one lite" doors, where practicable, so as not to detract from existing primary doors. Page 24 of the standards and guidelines contains a picture of the preferred front door with one lite and a minimal kickplate area. It also contained a picture of a storm door with a much larger kickplate area and a double pane, self-storing window. The words "NOT PERMITTED" appear immediately below this door.

C. Ownership of Property

3. At some point in time, Harold K. Moore (H.K. Moore Builders) acquired ownership of the property at 844 West Lovell Street. The property's current assessed value is \$34,350. (Commission Exhibits, Nos. 3 and 4)

D. Installation of Storm Door

4. Brian T. Moore, whose mailing address is 840 West Lovell Street, installed a metal storm door at the premises. The storm door that he actually installed was too small for the opening for

the door that was removed. Consequently, he used plywood to fill in a four-inch high area above the replacement door. The replacement door was metal rather than wood, and it had a large kickplate area at the bottom, as well as two window panes separated by a mutton.

E. Enforcement Efforts

5. On or about December 18, 1998, Jeff Howe, who served as temporary Historic Preservation Coordinator for Kalamazoo, drove by 844 West Lovell Street and observed what he believed to be an illegal storm door. He made a file note to that effect. (Commission Exhibit No. 8)

6. During late February or early March of 1999, Howe and the newly hired, permanent Historic Coordinator for Kalamazoo, Larry T. Burns, drove through Kalamazoo's historic districts, making notes about properties with apparent violations of the city's historic preservation standards and guidelines. Burns observed that the storm door at 844 West Lovell Street appeared to be in violation.

7. On or about April 16, 1999, Burns sent a letter, addressed to a "Mr. Moore" at 844 West Lovell Street, indicating that the premises had an unapproved new storm door, that a certificate of appropriateness should have been obtained, and that Moore should contact Burns to determine what course Moore would propose to correct the apparent violation. (Commission Exhibit No. 1)

8. Moore promptly contacted Burns, and Burns went to the premises on April 20, 1999, where they discussed the storm door for 45 minutes. In that regard, Burns explained that he was there to facilitate a positive outcome to the problem. They discussed the need for Moore to follow local historic preservation standards and guidelines. Moore indicated that he was familiar with them and loaned Burns his personal copy. The issue of economic hardship never came up. Burns gave Moore a blank application for historic project review. Moore completed, signed and filed it that day.

9. Burns took photos of the premises at about this time.

F. Commission Action

10. The Commission conducted its regular monthly meeting on May 18, 1999. Moore's application was on the agenda, but he did not attend. Burns addressed the Commission on Moore's behalf. Burns indicated that Moore did not want to change the metal storm door that had already been installed. The members of the Commission then discussed the fact that this particular door did not appear to meet federal Standard No. 6, in that the new features, e.g., two panes versus one, large kickplate area versus smaller area, did not match the old, and did not match Kalamazoo's standards and guidelines. Furthermore, the space above the replacement door, which was four inches too short for the opening, had been filled in with plywood. The Commission voted unanimously to deny the application.

11. The Commission sent Moore a written notice of denial on or about May 24, 199 (Case Number: 99-51). The reason cited for denying the application was: "Does not substantially meet the Secretary of the Interior Guideline #6". The notice also advised Moore of his right of appeal to the Review Board. (Commission Exhibit No. 4)

G. The Appeal

12. Moore subsequently submitted a written appeal, which was received by the Board on July 6, 1999. In the appeal, Moore wrote: "I am claiming undue financial hardship."

Conclusions of Law

As indicated above, section 5(2) of the Local Historic Districts Act, supra, allows a person aggrieved by a commission's decision to appeal to the State Historic Preservation Review Board. Section 5(2) also provides that the Review Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be ordered whenever a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and material error of law. Conversely, when a commission has reached a correct decision on an application, relief should not be granted.

A. Historic Preservation Standards and Guidelines

In a case such as this, the criteria that a commission must use to act on an application concerning work affecting the exterior of a resource, either by approving or denying a certificate of appropriateness, is set forth in section 5(3) of the Act.⁵ This provision indicates as follows:

Sec. 5. * * *

(3) In reviewing plans, the commission shall follow the U.S. secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

(a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.

(b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.

(c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.

(d) Other factors, such as aesthetic value, that the commission finds relevant. (Emphasis added)

The Commission has asserted that allowing Moore to keep the replacement metal door that he installed would violate Standard No. 6 of the Standards for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.⁶ Standard No. 6 provides as follows:

⁵ See footnote 1.

⁶ 36 CFR § 67.7.

6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence. (Emphasis added)

Doors are considered distinctive features in Kalamazoo's historic districts.

Besides citing Standard No. 6, the Commission also asserted that it acted in accordance with its own local standards and guidelines governing the repair and replacement of front doors. These standards and guidelines, which are set forth in detail on page 3 of Commission Exhibit No. 9, provide in relevant part that:

Storm doors (see attached standards)

Wooden storm and screen doors are preferred. However, aluminum or metal storm doors may be used so long as they are not mill finished or anodized aluminum. Baked enamel or other applicable finishes will be acceptable. The door stiles and rails should be a minimum of 4" wide and one lite doors, where practicable, are preferred in order not to detract from the existing primary door. Jalousie doors are not acceptable for use as storm doors in the historic districts.

Descriptive illustrations of acceptable and unacceptable storm doors were provided on page 24 of the standards and guidelines.

The Appellant's primary claim on appeal is that of "undue financial hardship". However, before addressing that claim, it is first useful to discuss the related issue of the replacement storm door's compliance with historic preservation standards and guidelines.

On this point, the Appellant asserted that his door is a mere "hairsbreadth" from the more expensive door the Commission would want. The Commission replied that the door chosen by Moore does not conform either to federal or local standards and guidelines, nor does it even fit properly within the opening for the original wooden door. Indeed, plywood was used to fill in whatever space was left over above the new door, after it was installed.

A review of the evidence in the appeal record, as well as the law applicable to this issue, strongly suggests that the Appellant's contention is without merit. All of the evidence indicates that the replacement door was modern in materials, design and appearance. It did not look like the illustration of the acceptable door in the local standards and guidelines. To the contrary, it is an exact match for a door that was illustrated and identified in the local standards and guidelines as "not permitted" within the historic district. Obviously, the door in question is simply a modern replacement storm door, not intended for use in historic structures. It effectively covers and obscures the main entrance door it protects. Indeed, it in no way complies with the applicable historic preservation standards and guidelines.

In summary, the Appellant's argument that the storm door he installed was a mere "hairsbreadth" from a historically accurate door, must clearly be rejected.

B. Undue Financial Hardship

With respect to the primary claim in this case, the Appellant has appealed on the basis of a single assignment of Commission error; namely, that the Commission actions resulted in an undue financial hardship to the Appellant. In support of this contention, the Appellant submitted copies of his federal income tax returns for 1996, 1997 and 1998. The 1998 return indicated that for the tax year, he had business income well exceeding \$10,000, plus substantial interest income, but that he did not earn any salary or wages during the year.

As noted earlier in this decision, the burden of proof in this case is carried by the Appellant. The Appellant (and not the Commission) must show that there is a financial hardship and that the Commission improperly failed to consider that hardship when denying the application.

The Appellant set about proving his contention by presenting evidence designed to show that he is a person of modest means. He inferred that as such, he could not afford to purchase a replacement storm door which is historically accurate.

The Appellant's proofs in support of his appeal are unpersuasive, for several reasons.

In the first place, the Appellant presented no real evidence of "hardship". Black's Law Dictionary, (rev. 6th ed), 1990, p 717, defines "hardship" as "suffering" or "adversity". Simply put,

there is no evidence in the official record (and again, this is the Appellant's burden to produce) of any financial suffering or adversity resulting from the purchase of a historically accurate storm door.

Indeed, the Appellant failed to present any evidence regarding the price of the door that he did install, or the total cost of his installation project, including the cost of plywood, paint, and labor. Similarly, he failed to present any evidence to specify the price of the "expensive door" that the Commission would want. Without these two costs to compare, it is far from clear that there is any financial hardship whatsoever within the context of this case.

Although there was no requirement that the Commission furnish information on this point at the hearing, the Commission's representative, Burns, testified at the hearing that based on his experience, the price of the Appellant's installed door was probably under \$200, and that at most, a historically accurate door would cost only \$50 more than that. The Appellant reported business income between \$10,000 and \$20,000. A \$50 expenditure hardly represents "adversity" under these facts.

Furthermore, the evidence in the record indicates that Brian T. Moore did not even own the building. Rather, it was owned by his brother's construction firm. The Appellant failed to present any evidence describing the financial relationship between him and his brother. The Appellant also failed to present evidence

concerning why his brother, who actually owned the building, would not be financially responsible for making all expenditures for capital improvements and other purchases, such as replacement windows and new storm doors.

In summary, there is no substantial evidence in the appeal record of any financial hardship, "undue" or otherwise, on the Appellant as a result of the Commission's decision in this case. It is therefore concluded that the Commission's decision to deny the Appellant's application for retroactive approval of his storm door, was justified.

Conclusion

In light of the entire appeal record made in this case, it is concluded that the Appellant failed to show that allowing the front storm door installed on the building at 844 West Lovell Street to remain, would result in an undue financial hardship.

It is further concluded that the Commission acted properly when applying the law and that it also acted properly when denying Moore's request to retain the replacement storm door he installed in a building in the Vine Area/South Street Historic District.

Recommendation

In consideration of the above, it is recommended that the appeal be denied.

Dated: September 9, 1999

Nicholas L. Bozen
Nicholas L. Bozen (P11091)